COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
James Robinson)
(your name))
)
Appellant.)

No. 43695-7-II

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, James Robinson, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

See attached Paper's

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

Date: 12-17-12

Signature: James Robinson

Form 23

APPENDIX 1

State's Sentencing Memorandum No. 11-1-00222-0

COPY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASINGTON, Plaintiff, vs. JAMES ROBINSON, Defendant.	No. 11-1-00222-0 STATE'S SENTENCING MEMORANDUM

COMES NOW Jonathan Meyer, Prosecuting Attorney for Lewis County, Washington, by and through his Deputy Prosecuting Attorney, Kjell C. Werner, and submits the following report for consideration at the sentencing of the defendant in the above-entitled cause.

NATURE OF CASE

On December 29, 2011, the defendant was charged by Information with Possession of a Controlled Substance, to wit: Cocaine; and Bail Jumping.

After a jury trial in this case, the jury returned a verdict of guilty as to Counts I and II. Sentencing in this matter is currently set for April 25, 2012, at 2:30 P.M.

CURRENT OFFENSE

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Because the Court has heard all of the testimony at trial, the State will not repeat the facts here. One thing the State will add to the record, however, is that the defendant failed to appear for his initial arraignment and trial setting hearing on April 14, 2011, after having signed to be personally present at his preliminary appearance, which took place on April 4, 2011. The defendant absconded and did not reappear before the Court until December 13, 2011, approximately eight months later.

PRIOR RECORD

	Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	Type of Crime
1	VUCSA	08-06-2001	02-15-2002	King County, WA	A	NV-F
2	VUCSA	03-25-1998	08-20-1998	King County, WA	A	NV-F
3	Forgery	08-12-1996	12-12-1997	King County, WA	A	NV-F
4	VUCSA	04-21-1994	12-09-1994	King County, WA	A	NV-F
5	Attempted VUCSA	05-14-1991	10-11-1991	King County, WA	A	NV-F
6	Promoting Prostitution 2nd Degree	08-21-1984	06-26-1985	King County, WA	A	NV-F
7	Robbery 1st Degree	06-19-1985	06-26-1985	King County, WA	A	V-F

EVALUATION

It is the position of the State that the defendant has an offender score of 7, including one point for multiple current offenses. Per the Sentencing Reform Act of 1981, as amended:

> Class C prior felony convictions...shall *not* be included in the offender score if, since the last date of release from confinement...pursuant to a felony conviction, if any, *or* entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

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RCW 9.94A.525(2)(c) (emphasis added). For class B felonies, the "wash out" period is ten years, while class A felony criminal convictions are always included in a defendant's offender score. RCW 9.94A.525(2)(a) & (b).

On June 26, 1985, the defendant was convicted of Robbery 1st Degree, a class A felony. On that same date, the defendant was also convicted of Promoting Prostitution in the Second Degree, a class C felony. The defendant was committed to the Department and released on April 5, 1988. Since the sentences on both counts were served concurrently, and the crimes were both committed before July 1, 1986, they are only counted as one offense for sentencing purposes here. RCW 9.94A.525(5)(a)(ii).

On May 14, 1991, the defendant was arrested a felony violation of the Uniform Controlled Substances Act, which ultimately resulted in a conviction for Attempted Possession of a Controlled Substance on October 11, 1991. Although "unranked" in terms of seriousness under the Sentencing Reform Act, an attempted violation of the Uniform Controlled Substances Act is nonetheless a felony offense and counts for one point in determining the defendant's offender score. RCW 69.50.407. When the judgment and sentence was entered in that matter, the time period the defendant must have remained crime-free for any of his prior convictions to "wash out" was extended to October 11, 1996.

On April 21, 1994, the defendant was once more arrested for another felony violation of the Uniform Controlled Substances Act. The offense in that case was delivery of cocaine, a class B felony offense. The defendant was convicted of that

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offense on December 9, 1994. The defendant was sentenced to twenty four months in the Department, and was released on September 28, 1995. Once released, the defendant must have remained crime-free for the next five years, or until September 28, 2000, for any of his priors to "wash out".

Next, on August 12, 1996, the defendant was arrested for Forgery, a class C felony. The defendant was convicted of that offense on December 12, 1997, and sentenced to four months of confinement. The defendant must have remained crime-free for the following five years for any of his priors not to be included in his offender score.

On March 25, 1998, the defendant was arrested for a felony violation of the Uniform Controlled Substances Act, Delivery of Material in lieu of a Controlled Substance. The defendant was convicted of that class B felony offense on August 20, 1998, and sentenced to serve twenty four months of confinement. The defendant was committed to the Department and released on March 23, 2000. Again, the time period began anew, and the defendant must have remained crime-free until March 23, 2005 for any of his priors to "wash out".

On August 6, 2001, the defendant was arrested for a felony violation of the Uniform Controlled Substances Act, delivery of cocaine. The defendant was convicted of that offense on February 15, 2001, and sentenced to serve eighty seven months of confinement. The defendant was committed to the Department and released on June 28, 2006. At that time, the five years began again, requiring the defendant to remain crime-free until June 28, 2011 for *any* of his priors not to affect his offender score.

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Following his most recent release from confinement in 2006, however, the defendant was convicted of: Assault Fourth Degree in 2007; Driving While License Suspended or Revoked in the Third Degree two times in 2009; Theft in the Third Degree in 2010; Theft in the Third Degree in 2011; Bail Jumping in 2011; and finally Theft in the Third Degree in 2011. Because of these intervening non-felony criminal convictions, the defendant has not remained crime-free for a period of five years since his most recent release from prison. As such, all of the defendant's prior felony criminal convictions shall be included in the calculation of his offender score.

RECOMMENDATION

As for Count I, Possession of a Controlled Substance, to wit: Cocaine, the Defendant has an offender score of 7, and the seriousness level for this offense is I, therefore, the standard range is 12+-24 months. The community custody range for this offense is up to 12 months. The maximum punishment is 5 years in prison.

As for Count II, Bail Jumping, the Defendant has an offender score of 7, and the seriousness level for this offense is III, therefore, the standard range is 33-43 months. The maximum punishment is 5 years in prison.

Therefore, the State recommends that the court impose the following sentence:

1. 24 months in the Department of Corrections on Count I
2. 43 months in the Department of Corrections on Count II
3. 12 Months Community Custody on Count I
4. $200.00 Criminal Filing Fee

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5. $500.00 Crime Victim Assessment

6. $2000.00 VUCSA Fine

7. $500.00 Lewis County Drug Fund Contribution

8. $100.00 Felony DNA Collection Fee

9. $100.00 Crime Lab Fee

10. $1500.00 Attorney's Fees

11. $31.10 Sheriff Bench Warrant Return Fee

12. $1000 Jail Recoupment Fee

JONATHAN L. MEYER
Prosecuting Attorney

By: _____
Kjell C. Werner, WSBA #33810
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STATE OF ADDITIONAL GROUNDS RAP 10.10

ARGUEMENT.

Appellate Robinson Contend's that His case is Analogous to State v. Hunley, 161 Wn. App. 919, 253, P. 3d 448 (2011), and Stare decisis applies.

ISSUES Pertaining To Arguement.

1. BURDEN of Proof at Sentencing

Hunley also contends the 2008 amendents to RCW 9.94A.500 and .530 violate due process.[5] He argues that these section of SRA unconstitutionally relieve the State burden to prove prior convictions We agree

[10-13] ¶13 Our Supreme Court has consistently held that the State meet its constitutional burden to prove prior convictions at sentencing when it proves such convictions by a preponderance of the evidence. See State v. Ford, 137 Wn. 2d 472, 479-80, 973 P. 2d 452 (1999). In Ford, the court held that the State's "bare assertion, unsupported by evidence" are insufficent to prove a defendant's prior convictions. 137 Wn. 2d at 482. The Ford court held that under the basic principles of due process, the facts relied on in sentencing must have some Basis in the record 137 Wn. 2d at 482 (quoting State v. Breselin, 13 Wn App. 386, 396, 534 P.2d 1394 (1975)). The court futher held that the prosecutor's assertions are neither facts nor evidence, but merely argument. Ford, 137 Wn. 2d at 483 n.3. In its analysis, the noted the critical importance of due process at sentencing, quoting the ABA Standards for Criminal Justice. See Appendix I page 2

"The meaning of appropriate due process at sentencing is not ascertainable in strictly utilitarian terms. There is an important symbolic aspect to the requirement of due process. Our concept of the dignity of individuals and our respect for the law itself suffer when inadequate attention is given to a decision critically affecting the public interest, the interests of victims, and the interests of the persons being sentenced. Even if informal, seemingly casual, sentencing determination reach the same results that would have been reached in more formal and regular proceeding, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental stat pawr to impose criminal sanctions."

Ford, 137 Wn.2d at 484 (quoting Am. Bar Ass'n ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING std. 18-5.17, at 206 (3d ed. 1994))

Based on this analysis, the court held:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirement of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.

Ford, 137 Wn.2d at 482 (emphasis added). In other words, constitutional due process requires the State to meet its burden of proof at sentencing. The defendant's silence is not constitutionally sufficient to meet this burden. The court has reaffirmed this rule in subsequent opinion including In re Personal Restraint of Cadwallader, 155 Wn 2d 867, 867, 123 P.3d 456 (2005); State v Bergstom, 162 Wn. 2d 87, 93, 169 P.3d 816 (2007); and State v. Mendoza, 165 Wn. 2d 913, 928-29, 205 P.3d (2009)

In 2008, the legislature amended RCW 9.94A.500(1) to add "A criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the conviction listed therein" LAWS OF 2008, ch. 231, §2. And the legislature amended RCW 9.94A.530(2) to add that "not objecting to criminal history presented at the time of sentencing" comstitutes acknowledgement of the criminal history. LAWS OF 2008, ch. 231, §4. These amendments attempt to overrule Ford and its progeny by providing that a criminal history, and that failure to object to this summary constitutes acknowledgement. However, the legislature has no power to modify or impair a judicial interpretation of the constitution. Seattle Sch. Dist. No. I of King County v State, 90 Wn 2d 476, 497, 585 P.2d 71 (1978). Ford has base on the constitutional principle of due process. 137 Wn 2d at 482. Thus, the 2008 amendment to RCW 9.94A.500(1) and 9.94A.530(2) cannot constitutionally convert a prosecutor's "bare assertions" into evidence or shift the burden of proof by treating the defendant's silence as acknowledgement

RCW 9.94A.500(1) is not facially unconstitutional. Rather, it is unconstitutional as applied when used to relieve the State of its burden of proof at sentencing. So long as a criminal history summary" includes sufficient evidence of prior convictions, it does not violate due process for the State to use such a summary as prima facie evidence of criminal history. However, RCW 9.94A.530(2) is facially unconstitutional insofar as it provides that the defendant's failure to object to the bare assertions" in a criminal history summary constitutes acknowledgement. Ford and its progeny make clear that unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by presenting at least some evidence.

Here, the statement of prosecuting attorney is exactly the type of "bare assertion in Ford. The unsworn document simply list the crimes that the prosecutor believes Hunley to have been covicted of. Under Ford, such allegations are not evidence. The trial court violated Hunley's right to due process of law by sentencing him based on facts for which there was no evidence in the record. therefore, we vacate Hunley's sentence

Hunley argues that he should be resentenced with an offender score of zero

22 We acknowledge that the Ford court emphasized that it was placing "no additional burden on the State not already required under the SRA." 137 Wn.2d at 482. But this does not lead to the conclusion that Ford is based only on the SRA and not on due process. The Ford court noted that in State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986), the court "held that the use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence" 137 Wn.2d at 479-80. The Ammons court based this holding on the rule that defendants have "a liberty interest which minimal due process protects" at sentencing. 105 Wn.2d at 186. We recognize that Ammons did not announce that preponderance of the evidence is the lowest evidentiary standard permissible at sentencing. But in holding the State to that standard, the Ford court was adhering not only to the statutory requirement of the SRA, but also to the constitutional requirement of minimal due process. We disagree with the dissent not as to the constitutionally required standard of evidance at sentencing, but rather as to the character of the State's assertions of Hunley's criminal history. In our view, the State provided no evidence whatsoever of Hunley's criminal history, failing to satisfy even minimal due process.

23 Next, the dissent attempts to distinguish Ford on the grounds that there, the State relied on oral assertions as to the defendant's criminal history. Here, in contrast, the State relied on a written summary of the defendant's criminal history. But under Mendoza, this is a distinction without a difference. There, the State filed a statement of prosecuting attorney that listed the defendant's criminal history, listing

23 (con) the sentencing court and the date of each crime. Mendoza, 165 Wn.2d at 917-18. The court held that such a statement was not evidence of criminal history. See Mendoza, 165 Wn.2d at 929. So too here, the unsworn, written criminal history summary was not evidence of Ituntey's criminal history

24 We acknowledge that the legislature has amended RCW 9.94A.500(1) to provide that a criminal history summary shall be prima facie evidence of criminal history. But as noted above, under Ford, due process requires the State to offer some evidence of criminal history, and a prosecutor's assertions are not evidence. Defendants have a constitutional right to be sentenced based on evidence in the record; the legislature cannot stip this right by passing a law that simply labels the State's bare assertions as evidence[8]

CONCLUSION

James Robinson respectfully asks this court to vacate and remand for resentencing pursuant to Ituntey, Supra.

12-18-12

James Robinson

James Robinson